89-139

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No. 88-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELWIN F. HOLMES,
Petitioner,

v.

FRANCES SUE P. HOLMES,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether state courts, consistent with the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Sec. 1408 (1982 ed. and Supp V), may treat, as property divisible upon divorce, a portion of military retirement pay waived by the retiree in order to receive physical disability benefits under Chapter 61, Section 1201 of Title 10 of the United States Code.

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The decisions of the Supreme Court of Virginia, the Court of Appeals of Virginia, and the trial court are not based on an independent and adequate state ground because the state court's procedural law holding is solely dependent on the interpretation of federal law governing the calculation and treatment of military service members' retired and disability pay.

A. Independent and Adequate State Grounds

Respondent's only argument for denying the petition for a writ of certiorari in the present case is that the state court decisions below rest on an independent and

adequate state ground.[1] When the decision of a state court rests on independent and adequate state grounds, the Supreme Court of the United States will exercise judicial restraint and will decline to review the state court decision.[2] The Supreme Court exercises judicial restrain in such cases out of "its respect for state courts and its reluctance to issue advisory opinions which would not be binding on the state courts." [3]

In determining whether a state court decision is based on an independent and adequate state ground, the Supreme Court must first decide "whether the state court decision [is] grounded on *independent* state law." [4] The clearest example of a state court decision based on an *independent* state ground is where "the state court *plainly states* that . . . its decision [rests] sole[ly] on . . . an interpretation of the state's constitution." [5]

If the Court determines that a state court decision is "based on an identifiable, independent state ground, the Supreme Court must then [decide] if that independent

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[1] Respondent argues that the "decision as to whether to reopen the case [to consider the requirements of federal law] at the conclusion of the evidence . . . after the trial court has rendered its written opinion was solely within the trial court's discretion." Respondent's Brief at 8. Because the Virginia Supreme Court and the Court of Appeals of Virginia held that the trial court did not abuse its discretion in refusing to reopen the evidence, Respondent contends that the "decision [of the trial court] should not be reviewed by this court." *Id.*

[2] *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). *See also Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875).

[3] D. Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1084 (1984).

[4] *Id.*

[5] *Id.* at 1084-85 citing *e.g.*, *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied sub nom., California v. Anderson*, 406 U.S. 958 (1972) (emphasis added).

state ground [is] adequate to support [the] state court decision." *Id.* at 1085. Here "[a]gain, the [clearest] case is where the state court . . . *specifically declare*[s that] a state statute or regulation [is] invalid under the provisions of the state constitution." [6]

B. Federal and State Grounds Intertwined

Where a decision of a state court rests on both federal and state grounds, the Supreme Court must "ascertain for itself . . . whether the asserted [state or] non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). If "the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breath to sustain the judgment without any decision of the other," the Supreme Court will exercise jurisdiction over the issue presented. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). *See Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912). However, if "the non-federal ground has fair support, [the Supreme Court is] not at liberty to inquire whether [the state court decision] is right or wrong, but must accept it, as [the Court does] other state decisions of non-federal questions." 243 U.S. at 164.

C. *Michigan v. Long*

In deciding if an independent and adequate state ground exists in cases where the decision of a state court appears to rest on both federal and state grounds, the Supreme Court in *Michigan v. Long*, 463 U.S. 1032 (1983), stated that it would apply the following analysis:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not

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[6] *Id.* (emphasis added).

> clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. This rule makes it easy for the Court to decide if a state court decision was decided on an independent and adequate state ground when a state court opinion cites both federal and state law. If both federal and state authorities are cited in a state court opinion and the opinion lacks a "plain statement" that the court's decision rests on state grounds, the Supreme Court will assume that the state court decision rests on federal law.[7]

D. Present Case

In the present case, both the Court of Appeals of Virginia and the trial court discuss federal law in their opinions and acknowledge that the division of Petitioner's disability retirement benefits in a divorce action are governed by the Former Spouses' Protection Act. App. 6a-11a; App. 39a-41a; App. 45a-49a. In its March 28, 1985 opinion, the trial court specifically refers to the "Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408" and notes that "[t]he commissioner's report takes no cognizance of [Petitioner's] Air Force retirement benefits." App. 45a. The trial court then observes that "[a]t the time of the divorce these amounted to $3,540.00 monthly. Of this, $1,062.00 represents his retired pay and the balance, or $2,478.00, his

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[7] *See Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) (no "plain statement" in the opinion stating that the decision rests on upon adequate and independent state grounds); *New York v. Class*, 475 U.S. 106, 109 (1986) (opinion lacks the requisite "plain statement" that it rests on state grounds); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) (opinion lacks requisite "plain statement" that it rests on state grounds); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872-73 n.4 (1986) (absent "plain statement," the Court will conclude that Court of Appeals decision was premised on federal law).

disability retirement." *Id.* The trial court concluded that "[b]y virtue of [Virginia law], in conjunction with 10 U.S.C. Section 1408[, Petitioner's] armed forces retired pay . . . is marital property" subject to division on divorce. App. 46a. The trial court noted, however, that the $2,478.00 Petitioner received each month in disability benefits was not subject to division upon divorce in light of the provisions of subsection (a)(4) of the Former Spouses' Protection Act which "specifically exempts from its operation retired disability pay." App. 48a.

In its July 30, 1985 opinion, the trial court agreed to consider "the legal position of [Petitioner] . . . of whether military person['s] retired under 10 U.S.C. 1201 are entitled to have their retired pay exempt from distribution upon divorce" under the Former Spouses' Protection Act. App. 41a. In its December 17, 1985 and July 8, 1986 opinions, however, the trial court denied Petitioner's motion for reconsideration on this issue and the issue of how much of Petitioner's disability retired pay is subject to distribution under federal law in a divorce action. App. 28a; App. 23a. In denying Petitioner's motion, the trial court did *not plainly state* that its decision was based on an independent and adequate state ground.

The Court of Appeals of Virginia in its December 20, 1988 opinion notes that Petitioner "filed exceptions to the [trial court's] ruling, contending that since he was retired for disability reasons, his entire retirement pay was not 'disposable' under 10 U.S.C. S 1408(a)(4) and [that] therefore [it] was not available for distribution by monetary award." App. 6a. In connection with this issue, the Court of Appeals of Virginia analyzed 10 U.S.C. § 1401 and concluded that:

> The trial judge's ruling, however, does not constitute an error on its face because 10 U.S.C. § 1401 merely provides the basis to calculate the total retirement pay and does not designate the amounts of

> pay allotted to disability pay versus non-disability pay. Although the record indicates that the husband's monthly taxable income is $236, this evidence alone *does not necessitate a finding that an error in the method of determining the amount of disposable retirement was made.*

App. 11a (emphasis added). Based on its analysis of 10 U.S.C. § 1408(a)(4) and 10 U.S.C. § 1401, the Court of Appeals of Virginia concluded that the trial court did not abuse its discretion in failing to grant Petitioner's motion for a rehearing on the federal law issues he raised. App. 12a. Like the trial court, the Court of Appeals of Virginia opinion did *not state* that its decision was based on an independent and adequate state ground.

The Court of Appeals of Virginia and the trial court relied heavily on the interpretation of federal law in denying Petitioner's request for a rehearing. Based on the state courts' interpretations of federal law governing the calculation of military retired pay and the treatment of such pay in state divorce actions, the Virginia courts concluded that Petitioner's motion was a request for a rehearing on the basis of "after discovered" evidence, and that his motion was properly denied under state procedural law. App. 23a-24a; App. 12a.

At the trial level, Petitioner argued that he was entitled to a rehearing, not on "after discovered" evidence but on an "error on the face of the record," namely, the failure of the trial court to follow federal law governing the calculation and treatment of Petitioner's disability retired pay. App. 10a. *See* App. 32a-33a. It is Petitioner's contention, that the issue of whether his disability retired pay was subject to division under provisions of the Former Spouses' Protection Act, was not a factual matter to be raised as "after discovered" evidence, but rather was a matter of law involving the interpretation and application of federal statutes in his state divorce action. Petitioner contends, in other words, that the

amount of his disability retired pay was not a factual matter to determined by a trier of fact based on the evidence submitted by the parties, but was a matter of law to be determined by the trial court based on calculations using government formulas provided in federal statutes. The purpose of these formulas, Petitioner contends, is to ensure that the disability retired pay of military service members is figured uniformly throughout the nation and not left to the discretion of military retirees or federal or state officials.[8]

Petitioner submits that (1) the failure of the trial court to follow federal law on the question of whether Petitioner's pay was exempt from distribution under provisions of the Former Spouses' Protection Act, and (2) the failure of the trial court to follow federal law on the question of determining the amount of Petitioner's disability retired pay, are errors on the face of the record that Petitioner was required to bring to trial court's attention as soon as he became aware of them.

In sum, the Virginia courts concluded that Petitioner's disposable retired pay was a factual matter to be determined by the trier of fact and not a matter of law to be decided in accordance with federal statutes. Because the trial court considered Petitioner's disability retired pay to be a matter of fact, it denied Petitioner's motion for a rehearing on the grounds that he was trying to introduce "after discovered" evidence. In denying Petitioner's motion, the trial court denied Petitioner an opportunity to have his disability pay held exempt from distribution and to have the amount of his disposable retired pay determined by federal statute.

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[8] Respondent contends that the "amount of Colonel Holmes' disposable pay was an issue of fact, not of the law, as determined by the evidence admitted by the trial court . . ." App. 48a. Respondent's Brief at 6.

E. Federal Law Holding Integral to State Court Disposition

Where the Supreme Court decides that the procedural ruling relied upon by a state court turns on an interpretation of federal law, then the state procedural ruling is not an independent and adequate state ground supporting the court's judgment. In *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380 (1986), the Supreme Court stated that:

> [W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (citing *Herb v. Pitcairn*, [324 U.S. 117, 126 (1945)]; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

Id. at 388. As noted, the resolution of the state procedural law question in the present case depends on whether Petitioner's disability retired pay was exempt from division under provisions of the Former Spouses' Protection Act. If it was not exempt, then the resolution of the state procedural issue depends on whether the amount of Petitioner's disability retirement pay was a *factual matter* to be determined by the trier of fact based on the presentation of evidence by the parties or was a *matter of federal law* to be determined by the trial court in accordance with federal statutes.

CONCLUSION

Petitioner submits that the decisions of the Virginia courts are not supported by an independent and adequate state ground for two reasons:

First, none of the state court decisions contain a "plain statement" that the decision of the trial court rests on an independent and adequate state ground. *See Michigan v.*

Long, 463 U.S. 1032, 1042 (1983). While the opinions of the Court of Appeals and the trial court discuss both federal and state law, none of the state court opinions contain a "plain statement" that the trial court's holding is based on an independent and adequate state ground.

Second, it is clear that the resolution of the state procedural question is intertwined with the federal statutes and depends on an interpretation of federal law, namely how military retired and disability pay is calculated under 10 U.S.C. § 1401 and how military disability retired payments are treated under the provisions of section 1408 of the Former Spouses' Protection Act. Since the state procedural law holding is not independent of federal law, the Supreme Court has jurisdiction to hear the issue presented in this case.

Because "the federal-law holding is integral to the state court's disposition of the matter," the Supreme Court's ruling on the issue in the present case is not an advisory opinion.[9] In addition, it is critical that there be uniformity throughout the states in the way military service members' retired and disability pay is calculated and treated in divorce actions under provisions of the Former Spouses' Protection Act. Military retired and disability pay cannot be calculated by the state courts in 50 different ways and treated differently by the state courts under the Former Spouses' Protection Act. Federal law clearly prescribes how military retired and disability pay is to be calculated and how it is to be treated when it becomes the subject of division in a state divorce proceeding. The calculations to be made and how the pay is to be divided in divorce actions are not factual matters to be determined by the triers of fact after considering the evidence presented by the parties, but are matters of law to be determined by the trial courts.

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[9] *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 388-89 (1986).

For the reasons stated, Counsel for the Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case (1) because the decisions of the Supreme Court of Virginia and the Court of Appeals of Virginia are not based on an independent and adequate state ground; (2) because the decision of the Supreme Court of Virginia is in conflict with the Supreme Court of the United States' recent decision in *Mansell v. Mansell*, —— U.S. —— (No. 87-201, May 30, 1989); (3) because the decision of the Supreme Court of Virginia ignores the "plain and precise" language of Section 1408(a)(4)(E) of the Former Spouses' Protection Act (1982 ed. and Supp. V); and (4) because the decision of the Supreme Court of Virginia ignores the language of Section 104(a)(4) of the Internal Revenue Code which provides that Petitioner's nontaxable disability benefits are not to be reclassified and treated as taxable income for purposes of dividing property in a state divorce action.

Respectfully submitted,

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